

**MEMORANDUM OF AGREEMENT
BETWEEN
STATE OF HAWAII DEPARTMENT OF HEALTH AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX
REGARDING
DELEGATION OF NATIONAL EMISSION STANDARDS
FOR HAZARDOUS AIR POLLUTANTS**

I. INTRODUCTION

This Memorandum of Agreement (Agreement) establishes procedures to facilitate delegation to the State of Hawaii Department of Health (HDOH) of the authority to implement and enforce federal rules, emission standards, and requirements promulgated under Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (Section 112 federal rules). This Agreement further sets forth the manner in which the United States Environmental Protection Agency, Region IX (EPA), and HDOH will coordinate their respective responsibilities to ensure expeditious delegation of the Section 112 federal rules to HDOH. EPA and HDOH will review this Agreement as the need arises.

Pursuant to Section 112, EPA promulgates national emission standards for hazardous air pollutants, i.e., the Section 112 federal rules. Under Section 112(l), a state may develop and submit to EPA for approval a program for the implementation and enforcement of promulgated Section 112 federal rules, provided certain specified approval criteria have been met. On November 26, 1993, EPA promulgated regulations, codified at 40 C.F.R. Part 63, Subpart E (Subpart E), to provide guidance useful to states in developing programs for submittal under Section 112(l). Subpart E was later revised on September 14, 2000. *See 65 Federal Register* 55809. While a state's submission of rules or programs under 112(l) is voluntary, a state seeking to implement and enforce some provisions of its own program in lieu of a Section 112 federal rule needs to obtain EPA approval under Subpart E. Once approval is granted, the approved state rules or programs would be federally enforceable and would substitute for the otherwise applicable Section 112 federal rule within that state's jurisdiction. Regardless of whether a state rule or program is approved or disapproved, nothing shall prohibit EPA from enforcing any applicable emission standard or requirement under Section 112. *See Section 112(l)(7) and 40 C.F.R. § 63.90(d)(2).*

Subpart E includes several options for requesting approval of state rules or programs. Under one of these options, a state may request delegation of Section 112 federal rules as promulgated without changes. To obtain approval under this option, a state need only meet the criteria in 40 C.F.R. § 63.91. On December 1, 1994, EPA promulgated approval under Section 112(l)(5) and 40 C.F.R. § 63.91 of HDOH's program for receiving delegation of Section 112 federal rules that are unchanged from the Section 112 federal rules as promulgated. *See 59 Federal Register* 61549. During this approval process, HDOH informed EPA that it intends to obtain the regulatory authority necessary to accept delegation of the Section 112 federal rules by

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incorporating by reference these rules into state codes of regulation (Hawaii Administrative Rules). *See* 59 Federal Register 61551. This Agreement establishes procedures to facilitate this delegation process.

II. POLICY STATEMENT

EPA and HDOH are responsible for ensuring that their respective obligations under this Agreement are met. In summary, HDOH has the responsibility to incorporate the Section 112 federal rules into the Hawaii Administrative Rules by reference and to initiate the delegation process by submitting an application that conforms with Subpart E. EPA has the responsibility to provide HDOH with information regarding upcoming Section 112 federal rules and amendments, and to review HDOH's applications. EPA and HDOH agree to a partnership of cooperation and coordination between their respective staffs to assure successful and effective delegation of the Section 112 federal rules.

III. INFORMATION SHARING

A. GENERAL

EPA and HDOH agree to participate in conference calls, as needed, to discuss legal, policy, resource, or technical issues related to delegation of Section 112 federal rules.

B. EPA

1. EPA will update HDOH periodically on important developments under Section 112, including progress on the proposal and promulgation of Section 112 federal rules and development of EPA policies. EPA agrees to provide HDOH with the names, addresses, and phone and fax numbers of the EPA contacts for each Section 112 federal rule, as well as any information regarding delegation.
2. EPA agrees, when reasonably foreseeable, to communicate to HDOH that the implementation and enforcement of any new Section 112 federal rule may require additional legal, technical, or financial resources on the part of HDOH.
3. EPA will provide HDOH with any information EPA may have collected regarding sources within HDOH's jurisdiction that may be subject to a Section 112 federal rule.

C. HDOH

1. HDOH will work cooperatively with EPA to identify all sources within HDOH's jurisdiction that may be subject to a Section 112 federal rule.

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2. HDOH agrees to notify EPA in advance of any proposed program changes that may affect HDOH's ability to implement or enforce any Section 112 federal rule for which HDOH has received delegation or will request delegation. Program changes of concern include modification of HDOH's legal authorities (e.g., statutes, regulations, or judicial or legislative actions affecting those authorities), modification of resource levels, modification of implementation schedules, etc., that were part of any approval under Section 112 or Subpart E.
3. HDOH understands that EPA may request HDOH to provide the information or the demonstrations referenced in 40 C.F.R. § 63.96(a).

IV. DELEGATION PROCEDURES

A. HDOH

1. HDOH intends to obtain the regulatory authority necessary to accept delegation of the Section 112 federal rules by incorporating these rules into the Hawaii Administrative Rules by reference.
2. For each Section 112 federal rule (or group of rules) for which HDOH will seek delegation, HDOH agrees to submit a letter as soon as practicable to the Director of EPA Region IX's Air Division requesting delegation of the Section 112 federal rule. HDOH will include with this letter, proof that HDOH has obtained the necessary regulatory authority to fully implement and enforce the Section 112 federal rule for which it is seeking delegation. This proof shall include a certification of adoption and a copy of the regulatory provisions by which the Section 112 federal rule was adopted.

B. EPA

1. In response to a letter requesting delegation of a Section 112 federal rule, EPA agrees to review the request and respond in writing as to whether the delegation is approved or disapproved.
2. If the delegation request is approved, the effective date of the delegation of the Section 112 federal rule will be the date when the Director of EPA Region IX's Air Division signs the approval letter.
3. Periodically, EPA will publish in the Federal Register an updated list of the Section 112 federal rules that have been delegated to HDOH.

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V. POST-DELEGATION

A. HDOH

1. HDOH understands that for any Section 112 federal rule for which it receives delegation, HDOH will be the primary implementing agency and will be responsible for implementing and enforcing the Section 112 federal rule independent of and in addition to the conditions of any affected source's operating permit under 40 C.F.R. Part 70.
2. HDOH agrees to retain records required by Section 112 federal rules, and make records available to EPA upon request.
3. HDOH understands that certain authorities are retained by EPA and are not delegable to HDOH. *See*, for example, 40 C.F.R. §§ 63.90(d) and 63.91(g)(2). In general, authorities that are not delegable include those functions that require rulemaking in the Federal Register or those situations where federal oversight is the only way to ensure national consistency in the application of the standards.
4. HDOH agrees that delegation of 40 C.F.R. Part 63, Subpart A will include the "Category I" authorities listed in 40 C.F.R. § 63.91(g)(1)(i). EPA retains the authority to make decisions according to the "Category II" authorities listed in 40 C.F.R. § 63.91(g)(2)(ii).
5. HDOH agrees to forward to EPA a copy of all decisions made pursuant to "Category I" authorities (as mentioned in 40 C.F.R. § 63.91(g)(1)), as well as any determinations made pursuant to 40 C.F.R. §§ 63.6(i) or 63.5(f). In addition, HDOH agrees to provide EPA with a copy of any requests sent to HDOH for minor or intermediate alternatives to MACT standard test methods or monitoring, prior to approval or disapproval by HDOH.

B. EPA

1. After delegation of a Section 112 federal rule, EPA agrees to continue to provide assistance to HDOH in the implementation or enforcement of the Section 112 federal rule.
2. Pursuant to 40 C.F.R. §§ 63.9(a)(4)(ii) and 63.10 (a)(4)(ii), EPA hereby waives the requirements that notifications and reports of affected sources be submitted to EPA for any Section 112 federal rules for which HDOH has received delegation (i.e., upon delegation, affected sources need only submit required notifications and reports to HDOH). EPA reserves the right to reevaluate the appropriateness of such a broad waiver in the event of programmatic changes or on a source category basis.

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VI. DISCLAIMERS

1. This Agreement is for the benefit of EPA and HDOH. This Agreement does not create any rights, duties, or obligations, implied or otherwise, in any third parties.
2. As stated above, nothing shall prohibit EPA from enforcing any applicable emission standard or requirement under Section 112.

This Agreement shall become effective when signed by both parties.



Laurence K. Lau
Deputy Director for Environmental Health
State of Hawaii Department of Health

Date: July 18, 2005



Deborah Jordan
Director, Air Division
U.S. EPA Region IX

Date: August 2, 2005